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IN THE

Supreme Court of the United States

October Term, 1943.

No. [redacted].81

OTIS & CO.,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION and THE UNITED LIGHT AND POWER COMPANY,

Respondents.

In the Matter of the Application of Securities and Exchange Commission to Enforce and Carry Out a Plan to Effectuate the Provisions of Section 11 (b) of the Public Utility Holding Company Act of 1935 With Respect to The United Light and Power Company.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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SECURITIES AND EXCHANGE COMMISSION AND THE UNITED LIGHT AND POWER COMPANY,

Respondents.

In the Matter of the Application of Securities and Exchange Commission to Enforce and Carry Out a Plan to Effectuate the Provisions of Section 11 (b) of the Public Utility Holding Company Act of 1935 With Respect to The United Light and Power Company.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

Comes Now, Otis & Co., a corporation of the State of Delaware, and respectfully prays for a Writ of Certiorari to the Circuit Court of Appeals, for the Third Circuit, to review a judgment entered in the above-captioned matter on April 20, 1944.

A certified transcript of the record before the Circuit Court of Appeals at argument, consisting of the appendices to the briefs, and the proceedings in said Circuit Court of Appeals, is presented herewith in accordance with Rule 38 of this Court.

Summary of the Matter Involved.

The judgment which petitioner seeks to review is one wherein the Circuit Court of Appeals, for the Third Circuit, affirmed a final Order entered by the United States District Court, for the District of Delaware, approving a Plan submitted by The United Light and Power Company under Sec. 11 (e) of the Public Utility Holding Company Act of 1935, 15 U. S. C. A. Sec. 79K (e), to comply with the requirements of Sec. 11 (b) of the Act, 15 U. S. C. A. Sec. 79K (b).* The case originated in the District Court on an application of the Commission pursuant to Secs. 11 (e) and 18 (f) of the Act for Court approval and enforcement of the Plan submitted by Power. The Plan makes provision for the liquidation and dissolution of Power by first distributing all of its assets to its preferred and common stockholders on the basis of 94.52% and 5.48% respectively, although the total assets of Power do not have a present value equal to the liquidation preferences of the preferred stock as set forth in the charter. The District Court nevertheless found the Plan to be "fair, equitable and appropriate to effectuate the provisions of Section 11" of the Act and entered an Order directing that it be carried out. Petitioner contends that it is not "fair and equitable" to the preferred stockholders, of which petitioner is one.

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* The Securities and Exchange Commission will be called "Commission." The United Light and Power Company will be called "Power" and the Public Utility Holding Company Act of 1935, 49 Stat. 838, 15 U. S. C. A. Sec. 79, will be called "the Act."

Short Statement of the Matter Involved.

The facts are not in dispute. Power is the top holding company in a large, public utility holding company system. As it is a holding company with subsidiary companies, which are in turn holding companies, Sec. 11 (b) (2) of the Act proscribes its continued existence. The Commission itself took action prior to the filing of the instant Plan to terminate the existence of Power. By Order dated March 20, 1941, the Commission directed that Power "shall be liquidated and dissolved." (Holding Company Act Release No. 2636; R. 139-140.)* The Commission said that the present Plan (R. 112-120a) "is the final step in fulfilling the portion of our Order of March 20, 1941, requiring the liquidation and dissolution of Power" (R. 7a), and then found that the present Plan "provides for the liquidation and dissolution of power." (R. 11a.) The District Court stated: "I accept the findings of the Commission that there is necessity * * * for Power to liquidate pursuant to Sec. 11 (b) (2)." (R. 98a.)

The liquidation provided by the Plan is one which allows the common stock to participate in the distribution of the assets of Power, although the present value of the assets of Power is not equal to the liquidation preferences of the preferred stock. The charter of Power provides that "Upon the dissolution or liquidation of the corporation, *whether voluntary or involuntary*" the holders of preferred stock shall receive $100.00 per share, plus accumulated dividends, "before any payment is made to the holders" of the common stock. (R. 46a.) The Commission first found that the Plan was appropriate to effectuate the provisions of Section 11 of the Act, and then said:

> "The second required finding, namely, that the plan is 'fair and equitable to the persons affected by

*The record presented herewith consists of certified copies of the appendices used below. In the Circuit Court of Appeals petitioner was the appellant.

such plan,' presents a more difficult problem. The assets of Power are, in our opinion, of insufficient value to satisfy the stated liquidation preference of the preferred stock in the amount of $100 per share for 600,000 shares, plus arrearages of $38,700,000, or a total of $98,700,000, as of December 31, 1942.

* * * * * *

"* * * present book values of assets pro forma are clearly insufficient to cover the liquidation preference of Power's preferred stock. Similarly, on the basis of a capitalization of reasonably anticipated earnings of the enterprise [9] we are unable to find an over-all value for the assets which approaches $98,700,000.

* * * * * *

"* * * In the light of all the circumstances, we conclude that on no reasonable basis for capitalizing prospective earning power could we arrive at a valuation equal to the liquidation preference.

"If the amount of the liquidation preference of the preferred stock ($100 per share plus accumulated dividends) is controlling, our inquiry must perforce be ended at this point in a decision that the preferred stock is entitled to all the assets of the corporation to the exclusion of the common."

(R. 11a-13a.)

The District Court said:

"If the dividend claim is capitalized as a matured obligation, the total claim of preferred will be $98,700,000. All parties agree also that the assets * * * have not a present value equal to that amount. If the con-

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"[9] It is clear that capitalization of prospective earnings, rather than book values, is the principal criterion of asset value. *Consolidated Rock Products v. DuBois*, 312 U. S. 510."

tractual preferences are operative it is clear there will be nothing for the common shareholders.

"The problem for determination is whether the plan is 'fair and equitable'. Concededly, the plan does not satisfy the 'absolute priority' rule which is applied in equity and bankruptcy reorganizations.[4] Under that rule, no plan can be fair and equitable which permits a junior security to retain an interest in the reorganized corporate enterprise before the securities senior to it have been paid in full (but not necessarily in cash) for the rights which they surrender. The value of the reorganized concern is projectively determined by a capitalization of the 'guess' earnings of the new concern and comparing the valuation so arrived at with the total claims of the old senior securities. The present plan fails to meet this test, as junior interests are allowed to participate in the new capital structure of Railways when it is conceded that Railways' common is not worth $98,700,000 on any basis of valuation. *If the claims of the preferred stockholders are to be treated as matured as in an equity or bankruptcy reorganization, there can be no participation for the common stock under the 'absolute priorities' rule.*"

(R. 98a-99a.)
(Italics supplied.)

The Circuit Court accepted the findings of the Commission that "The assets of Power are • • • of insufficient value to satisfy the stated liquidation preference of the preferred stock in the amount of $100 per share for 600,000 shares,

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[4] "Case v. Los Angeles Lumber Products Co., 308 U. S. 106; Consolidated Rock Products Co. v. duBois, 312 U. S. 510; Marine Harbor Properties v. Manufacturers T. Co., 317 U. S. 78; Ecker v. Western Pacific R. Corp. U. S. , and Institutional Investors v. Chicago, M., St. P. & P. R. Co., U. S. ."

plus arrearages of $38,700,000, or a total of $98,700,000, as of December 31, 1942." (R. 149.)

Although the Commission, the District Court, and the Circuit Court all accepted the fact that the common stock of Power was "under water" upon every reasonable estimate of the present value of Power's assets, they nevertheless determined that it would be "fair and equitable" to give the common stockholders 5.48% of these assets upon the instant liquidation, which has been forced upon Power to comply with the provisions of the Act. They came to this conclusion by adopting the theory that the present claims of the preferred stock upon the assets of Power *should not be considered as having matured.*

The Commission said:

> "* * * In our view, it is not inconsistent with the bankruptcy and equity precedents to conclude that in reorganizations or liquidations to comply with Section 11, stockholders affected should be given participations according to their contractual or other rights determined *as though in a continuing enterprise*, and that the process of compliance with the statute should not be permitted to mature liquidation preferences." (Italics in text.)
>
> (R. 14a.)

The District Court said in considering this view: "This is a new approach to the problem." (R. 100a.) He followed this new approach, and concluded:

> "* * * the common stockholders should be given a chance to recoup, especially where the reason for liquidation is purely fortuitous, and where the future condition of the new enterprise is based on a surmise."
>
> (R. 101a.)

The Circuit Court in affirming the District Court, said:

> "* * * Though the preferred stockholders of Power have contract rights which entitle them to the

payment of $100 a share and accumulated dividends on liquidation or dissolution of Power, those rights, at least in the absence of insolvency, have not matured and cannot mature for the reason that the congressional mandate contained in the Act strikes across their contract rights and the maturities embraced by them, severing them." (R. 156.)

This new approach has not been before the Courts except in this case, and is one which has divided the Commission. The majority has adopted it. Judge Healy has set forth his views, which are in opposition to the majority, in a vigorous dissent in this case (R. 46a-86a) and in other dissenting and concurring opinions.*

After concluding that the claims of the preferred stock to the assets of Power should not be considered as having matured, the Commission indulged in a guess as to what might happen in the event the enterprise continued, as it might have done but for the passage of the Act proscribing its existence. The Commission guessed that if the enterprise continued, the arrearages on the preferred stock could be discharged at the expiration of 15 years, after which time there would be earnings available to pay dividends on the common stock. Because of the possibility that there might be earnings available to pay dividends on the common stock after 15 years, if the enterprise could have continued uninterrupted by the passage of the Act, the

*International Paper and Power Company, 2 S. E. C. 274, at 285 ff.; Federal Water Service Corporation, 8 S. E. C. 893; Columbia Gas and Electric Corporation, S. E. C. , Holding Company Act Release No. 3885 (1942); Engineers Public Service Company, S. E. C. , Holding Company Act Release No. 4114 (1943); Puget Sound Power & Light Company, S. E. C. , Holding Company Act Release No. 4255 (1943); Southern Colorado Power Company, S. E. C. , Holding Company Act Release No. 4501 (1943); Virginia Public Service Co., S. E. C. , Holding Company Act Release No. 4618 (1943).

Commission determined that the Plan was "fair and equitable" in giving to the common stockholders at the present time 5.48% of the assets, having a value of approximately $4,000,000.00. (See Balance Sheet, R. 5a.)

Petitioner objected below to the approval of the Plan on the ground that it is not "fair and equitable" to give the preferred stockholders less than their full liquidating preferences as called for under the "full or absolute priority" rule established by this Court in *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, 60 S. Ct. 1, 84 L. ed. 110.

Statement Disclosing the Basis Upon Which It Is Contended That This Honorable Court Has Jurisdiction to Review the Judgment in Question.

The Statute under which the jurisdiction of this Court is invoked is Section 240 (a) of the Judicial Code (28 U. S. C. A. § 347a).

The date of the judgment sought to be reviewed is April 20, 1944, and the date upon which this petition for Writ of Certiorari is presented is May 10, 1944.

The foregoing Summary and Short Statement of the Matter Involved shows the nature of the case and the ruling of the Court below which brings the case, a civil action, within the jurisdictional provisions relied on. The following cases are believed to sustain the jurisdiction:

Securities and Exchange Commission v. Chenery Corporation, et al., mem. 317 U. S. 609, 63 S. Ct. 52, 87 L. ed. 494; 318 U. S. 80, 63 S. Ct. 454, 87 L. Ed. 626.

Consolidated Rock Products Co. v. duBois, mem. 311 U. S. 636, 61 S. Ct. 71, 85 L. ed. 405; 312 U. S. 510, 61 S. Ct. 675, 85 L. ed. 982.

A. C. Frost & Co. v. Coeur D'Alene Mines Corp., mem. 311 U. S. 624, 61 S. Ct. 9, 85 L. ed. 396; 312 U. S. 38, 61 S. Ct. 414, 85 L. ed. 500.

Electric Bond & Share Company, et al. v. Securities and Exchange Commission, et al., mem. 302 U. S. 681, 58 S. Ct. 411, 82 L. ed. 526; 303 U. S. 419, 58 S. Ct. 678, 82 L. ed. 936.

Federal Trade Commission v. Raladam Co., mem. 282 U. S. 829, 51 S. Ct. 86, 75 L. ed. 738; 283 U. S. 643, 51 S. Ct. 587, 75 L. ed. 1324.

Included in the Record (R. 144 to 167) is a copy of the opinion delivered on April 20, 1944, by the Circuit Court for the Third Circuit upon the rendering of the judgment sought to be reviewed, as corrected by Order dated April 26, 1944.

Questions Presented.

1. Is the instant Plan "fair and equitable" within the meaning of that phrase as used in Sec. 11 (e) of the Act?

2. Are claims of preferred stock to preferences upon an "involuntary" dissolution or liquidation to be considered as matured and a claim upon the assets of a corporation ahead of claims of common stock when in complying with Sec. 11 (b) of the Act a plan for dissolution and liquidation is submitted under Sec. 11 (e) of the Act?

3. Can a plan to liquidate, submitted by a corporation under Sec. 11 (e) of the Act to comply with the requirements of Sec. 11 (b) of the Act, be approved by a District Court as "fair and equitable" which allows junior interests to participate and receive part of the assets before senior securities receive their full liquidation preferences?

4. Is the "full or absolute priority" rule as established in *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, applicable to plans submitted under Sec. 11 (e) of the Act to comply with the requirements of Sec. 11 (b) of the Act?

Reasons Relied On for Allowance of the Writ.

1. The Circuit Court of Appeals erred in holding that the instant Plan is "fair and equitable" to preferred stockholders of Power.

2. The Circuit Court of Appeals pointed out that: "The principles involved in the case at bar are of great public importance" (R. 154), and hence should be finally determined by this Honorable Court.

3. The judgment of the Circuit Court of Appeals that the instant Plan is "fair and equitable" is on an important question of federal law which has not been, but should be, settled by this Honorable Court.

4. The question presented looms large in the administration of the Act by the Commission, as many registered holding companies must take steps to comply with Sec. 11 (b) of the Act by submitting plans under Sec. 11 (e), and the Commission should have a determination by this Honorable Court on the relative rights of security holders to participate in such plans.

5. The question presented is a novel one and clearly of sufficient importance to warrant a determination by this Honorable Court.

6. The interpretation of the meaning of the phrase "fair and equitable" contained in Sec. 11 (e) of the Act by the Circuit Court of Appeals in this case is in conflict with applicable decisions of this Court.

Prayer.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Third Circuit, or, if its mandate has gone down, to the United States District Court for the District

of Delaware, commanding the Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case in said Circuit Court numbered and entitled on its docket "*No. 8463, In the Matter of the Application of Securities and Exchange Commission to Enforce and Carry Out a Plan to Effectuate the Provisions of Section 11 (b) of the Public Utility Holding Company Act of 1935 with Respect to The United Light and Power Company. Otis & Co., Intervening Preferred Stockholder, Appellant,*" and that the said judgment of the Circuit Court of Appeals for the Third Circuit affirming the Order of the District Court may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

OTIS & CO.,
Petitioner,

By ARTHUR G. LOGAN,
Continental American Building,
Wilmington 33, Delaware,
Its Attorney.

STATE OF DELAWARE,
NEW CASTLE COUNTY, } *ss.:*

BE IT REMEMBERED, that on this 9th day of May, A. D. 1944, personally appeared before me, the subscriber, a Notary Public for the State and County aforesaid, ARTHUR G. LOGAN, who, being by me first qualified according to law, did depose and say that he is the attorney for the petitioner named in the foregoing Petition; that he has read the foregoing Petition and that the facts set forth therein are true so far as the same relate to his own acts and deeds, and so far as the same relate to the acts and deeds of any other person or persons, he believes them to be true; and that this Petition is not filed for delay.

ARTHUR G. LOGAN.

Sworn to and subscribed before me the day and year first aforesaid.

ANNA R. SILVER,
Notary Public.

(Notarial Seal)

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OTIS & CO.,

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SECURITIES AND EXCHANGE COMMISSION AND THE UNITED LIGHT AND POWER COMPANY,

Respondents.

In the Matter of the Application of Securities and Exchange Commission to Enforce and Carry Out a Plan to Effectuate the Provisions of Section 11 (b) of the Public Utility Holding Company Act of 1935 With Respect to The United Light and Power Company.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A concise statement of the grounds upon which the jurisdiction of this Court is invoked is set forth in the foregoing Petition, pp. 8-9, *supra.*

A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate page references to the printed record, is set forth in the foregoing Petition under the headings Summary of the Matter Involved and Short Statement of the Matter Involved, pp. 2-8, *supra.*

Questions Presented.

1. Is the instant Plan "fair and equitable" within the meaning of that phrase as used in Sec. 11 (e) of the Act?

2. Are claims of preferred stock to preferences upon an "involuntary" dissolution or liquidation to be considered as matured and a claim upon the assets of a corporation ahead of claims of common stock when, in complying with Sec. 11 (b) of the Act, a plan for dissolution and liquidation is submitted under Sec. 11 (e) of the Act?

3. Can a plan to liquidate, submitted by a corporation under Sec. 11 (e) of the Act to comply with the requirements of Sec. 11 (b) of the Act, be approved by a District Court as "fair and equitable" which allows junior interests to participate and receive part of the assets before senior securities receive their full liquidation preferences?

4. Is the "full or absolute priority" rule as established in *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, applicable to plans submitted under Sec. 11 (e) of the Act to comply with the requirements of Sec. 11 (b) of the Act?

Argument.

I. Reasons Relied on for Allowance of the Writ Not Based on Merits of Petitioner's Assertion That Error Was Committed.

A. *The Principles Involved in the Case at Bar Are of Great Public Importance.*

The Circuit Court of Appeals pointed out that: "The principles involved in the case at bar are of great public importance." (R. 154.) The instant matter presents a question of great public importance because of the fact that numerous registered holding companies have submitted, or are about to submit, to the Commission plans under Sec. 11 (e) of the Act to comply with the provisions of Sec. 11 (b) of the Act and the relative rights of security holders of the corporations involved will be adjusted in accordance with the principles announced in the instant case, and hence these principles should be finally determined by this Honorable Court. If not determined by this Honorable Court at an early date, many plans may be submitted improperly adjusting the rights of security holders involving many millions of dollars. In some other circuit at a later date there may be a determination of the matter different from the determination made below, which would leave in chaos the status of the claims of many security holders throughout the United States. In *Electric Bond & Share Company, et al. v. Securities and Exchange Commission, et al.*, mem. 302 U. S. 681, 58 S. Ct. 411, 82 L. ed. 526; 303 U. S. 419, 58 S. Ct. 678, 82 L. ed. 936, this Court granted a Writ of Certiorari in order that there could be a final determination by this Court of certain principles of great public importance brought into existence by the passage of the Act. We submit that the instant question calls for a similar exercise of discretion by this Honorable Court.

B. *An Important Question of Federal Law Is Involved.*

The judgment of the Circuit Court of Appeals that the instant Plan is "fair and equitable" as that phrase is used in Sec. 11 (e) of the Act constitutes a decision on an important question of federal law. As the decision is on an important question of federal law which has not been settled by this Court, this Court should grant the Writ in order to settle the question. In *A. C. Frost & Co. v. Coeur D'Alene Mines Corp.*, mem. 311 U. S. 624, 61 S. Ct. 9, 85 L. ed. 396; 312 U. S. 38, 61 S. Ct. 414, 85 L. ed. 500, a petition for certiorari was granted. This Court said:

> "This action was based wholly on interpretation and application of the Securities Act. Thus a federal question arose which demands determination."

We submit the same reasoning applies here calling for the favorable exercise of the discretion of this Court upon the instant Petition.

C. *The Question Presented Looms Large in the Administration of the Act by the Commission.*

The question presented looms large in the administration of the Act by the Commission, as many registered holding companies must take steps to comply with Sec. 11 (b) of the Act by submitting plans under Sec. 11 (e), and the Commission should have a determination by this Honorable Court on the relative rights of security holders to participate in such plans. In *Securities and Exchange Commission v. Chenery Corporation, et al.*, mem. 317 U. S. 609, 63 S. Ct. 52, 87 L. ed. 494; 318 U. S. 80, 63 S. Ct. 454, 87 L. ed. 626, this Court granted a writ of certiorari to review proceedings originating, as the instant one does, in an Order by the Commission approving a plan. This Court said: "Because the question presented looms large in the administration of the Act, we brought the case here." We submit that the instant case should also be brought up as the question does loom large in the administration of the Act.

D. *A Novel Question Is Involved of Sufficient Importance to Warrant a Determination by This Honorable Court.*

The District Court recognized that the Plan adjusted senior and junior securities in an unorthodox and novel manner. The Court said: "This is a new approach to the problem." (R. 100a.) The District Court took the position that the common stockholders should be given "a chance to recoup." This idea that common stockholders should be given a chance to recoup after their stock is far "under water" when a corporation seeks to comply with the standards of Sec. 11 (b) of the Act is, we submit, a novel one. This Court should review this position and determine whether or not common stockholders in registered holding companies, which must comply with the standards of Sec. 11 (b) of the Act, can have their management formulate and submit plans bottomed on a theory of recoupment of their lost values.

II. Reasons Relied On for Allowance of the Writ Based Upon Error Committed by the Court Below and Going to the Merits of Petitioner's Contentions.

A. *The Judgment Below Made a Determination on a Federal Question in a Way in Conflict With the Applicable Decisions of This Court.*

The determination made by the court below as to the meaning of the phrase "fair and equitable" as contained in Sec. 11 (e) of the Act is in conflict with the determination made by this Court as to the meaning of such a phrase in *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, 60 S. Ct. 1, 84 L. ed. 110, where this Court held that the words are words of art, which, in the field of corporate reorganizations, as the instant case in effect is, require the application of the "rule of full or absolute priority." In

Case v. Los Angeles Lumber Products Co. a contention was made substantially similar to the one in this case with respect to the fact that the senior securities involved had not matured. There the contention was that the bonds had not matured and hence the stockholders were in a position "to remain in unmolested domination and control over the property" for a period of time, and, therefore, had an equity which could be recognized in the reorganization by giving the stockholders a participation, even though the stock was "under water." This Court rejected the contention and pointed out that by taking the step to place the corporation in line for reorganization under Sec. 77B, the stockholders had lost the right "to remain in unmolested domination and control over the property" and hence whatever nuisance value may have resided in the stock was lost and the stockholders could not participate. In the instant case the court below has refused to recognize the principle that by taking the step of submitting a Plan to comply with Sec. 11 (b) of the Act and requesting (R. 117a) enforcement through Court supervision under Sec. 11 (c), the right of the common stockholders to remain in unmolested domination and control over the property was lost, *if it had not been lost previously by the passage of the Act itself requiring compliance with the standards of Sec. 11* (b). Thus we find that in the instant case the court below refused to follow the decision of this Court in *Case v. Los Angeles Lumber Products Co.*, clearly applicable, that when plans are formulated and filed to reorganize a corporation, whether by compulsion of statute as involved here, or otherwise, senior rights mature and are entitled to their full and absolute priority before junior rights can participate. Other applicable decisions of this Court not considered and not followed are: *Consolidated Rock Products Co., et al. v. duBois*, 312 U. S. 510 (See discussion *infra*, p. 20), and *Continental Ins. Co. v. United States*, 259 U. S. 156 (See discussion *infra*, p. 23).

Commissioner Healy, dissenting in a vigorous opinion, set forth numerous reasons wherein the Plan is not "fair and equitable" in the light of the applicable decisions of this Court, and petitioner adopts said dissenting opinion and incorporates it herein by reference. It is printed in full in Appellant's Appendix. (R. 46a-86a.) In addition, Commissioner Healy has set forth his views in other dissenting and concurring opinions, to which we respectfully refer this Honorable Court.*

B. *The Circuit Court of Appeals Erred in Holding That the Instant Plan Is "Fair and Equitable" to Preferred Stockholders of Power.*

1. The liquidation preferences matured.

In addition to the views set forth by Commissioner Healy in his dissenting opinion in this case and in his other dissenting and concurring opinions referred to above, which we incorporate by reference and urge, we desire to argue that liquidation preferences of senior securities are matured by any reorganization, liquidation or dissolution which is forced by the Act, and that the normal rule of "full or absolute priority" governs in all such cases.

The Commission and courts below have taken the position that the usual rule of "absolute priority" which is applicable in the case of insolvent corporations, either in the bankruptcy or in the equity sense, is not applicable to any reorganization, liquidation, dissolution, or other proceedings that must necessarily be taken to comply with the

*International Paper and Power Company, 2 S. E. C. 274, at 285 ff.; Federal Water Service Corporation, 8 S. E. C. 893; Columbia Gas and Electric Corporation, S. E. C. , Holding Company Act Release No. 3885 (1942); Engineers Public Service Company, S. E. C. , Holding Company Act Release No. 4114 (1943); Puget Sound Power & Light Company, S. E. C. , Holding Company Act Release No. 4255 (1943); Southern Colorado Power Company, S. E. C. , Holding Company Act Release No. 4501 (1943); Virginia Public Service Co., S. E. C. , Holding Company Act Release No. 4618 (1943).

Act. We do not see how it can be so limited. *What material difference exists between a financial difficulty forcing a bankruptcy and some other difficulty which makes it impossible for the corporate venture to continue?* In *Consolidated Rock Products Co., et al. v. duBois*, 312 U. S. 510, 61 S. Ct. 675, 85 L. ed. 982, this Court said, "the absolute priority rule * * * applied to reorganizations of solvent as well as insolvent companies." (312 U. S. 527.) In the course of corporate history we have seen public policy expressed by Congress and the people in many acts and amendments including the Sherman[a] and Clayton Acts,[b] the National Prohibition Amendment,[c] the Hepburn Act,[d] and now the instant Act to terminate public utility holding companies. All of these affected the destinies of corporations, and terminated the ventures in which they were engaged. The continued existence of any corporation or its business cannot be foreseen or guaranteed. What then is the difference between bankruptcy, reorganization or some other emergency? A public policy expressed in an Act of Congress is now terminating the existence of Power, as it previously had of corporations which had become trusts or were in the liquor business. The passage of the Act marked the ultimate end of Power's existence or at least the end of the business venture in which it was engaged. Liquidation and dissolution now mark the finish line. Whatever the expectancies might have been, the rules of payment at the end, whenever reached, are laid down by the charter. These rules should govern the priority of payment to the respective stockholders regardless of how the end of the venture is reached.

We pointed out above that in *Case v. Los Angeles Lumber Products Co.* the contention was made that as the bonds had not matured when the plan of reorganization

a. 26 Stat. 209, 15 U. S. C. A. Secs. 1-7.
b. 38 Stat. 730, 15 U. S. C. A. Secs. 12-27.
c. 40 Stat. 1050.
d. 34 Stat. 584, 49 U. S. C. A. 1, etc.

was proposed, the stockholders were in a position "to remain in unmolested domination and control over the property" and hence had an equity entitling them to participation. This Court rejected the contention and then pointed out that when the plan was proposed, the stockholders had waived their rights and that, "Certainly the surrender of a right thus waived is not adequate consideration for the dilution of the bondholders' priorities which this plan would effect." In the instant case there is even greater reason to say that the stockholders' right "to remain in unmolested domination and control over the property" does not create an equity entitling the stock to participation, because the Act itself, in Sec. 11 (b), had proscribed the continued existence of the venture, and thus had terminated any such continuing control in the common stockholders. *The very purpose of the Act was to end the domination of great public utility empires by holding companies through the ownership of common stocks representing little or no equity value.*

The Commission and courts below deviated from the normal application of the "absolute priority" rule by concluding that the Act did not mature the claims of the preferred stockholders to their liquidating preferences, on the theory that the matter should be treated "*as though in a continuing enterprise.*" (R. 14a.) They do not treat this as the end. This approach is diametrically opposed to the intention of the Congress in passing the Act.

Prior to the passage of the Act, the preferred and common stockholders of Power had embarked upon a common enterprise to conduct a public utility holding company system with the top company, Power, having for its business the holding of stock in subsidiaries which were in turn public utility holding companies. The Congress determined that such systems had become "injurious to investors, consumers, and the general public." Sec. 1 (c). The Congress declared that it was the policy of the Act "to provide as soon as practicable for the elimination of (such) public-

utility holding companies." Sec. 1 (c). Not only was the policy of the Act set forth as being one to eliminate companies such as Power, but Section 11 (b) (2) directed that steps should be taken to terminate the life of holding companies such as Power. This is the "death sentence" of the Act. In the instant case Power has received its death sentence under the express terms of the Act and under the Order of the Commission of March 20, 1941. (R. 139-140.) The present Plan is intended to administer the death blow required by the law. *It is the end.* The public policy of this country as set forth in the Act and defined by the Congress is that a company such as Power should receive a death blow. As the preferred and common stockholders jointly embarked upon a venture which, by legislative fiat and Commission Order, must end, how can it be said that their respective rights to the assets remaining as defined by the charter, are as in a continuing enterprise? Under the law there is nothing left to do with Power but distribute its assets to those *now* entitled to them, and under the charter those *now* entitled to such assets are the preferred stockholders whose claims must be considered to be completely and fully matured by the termination of the venture. As the venture cannot continue, preferred stockholders are entitled to their contractual rights. The present Plan does not give them their contractual rights and hence is not "fair and equitable" to them.

The Commission and the courts below pointed to the President's message that the Act "will not destroy a penny of actual value of those operating companies which holding companies now control." (R. 158.) We can agree, but the President did not mean by that that the values of preferred stock would be diminished and diluted by allowing the participation of worthless common stock, as the Order below would allow in this case.

Although this "new approach" has not been before the courts except in this case, we do find precedent in a quite similar situation where common stockholders, upon

a forced liquidation and dissolution, contended in effect that in dividing the assets between preferred and common stock, the common stock should be treated as though in a continuing enterprise and not as though upon liquidation. This contention was rejected by this Court. The case is that of *Continental Ins. Co. v. United States*, 259 U. S. 156, at 177-181, 66 L. ed. 871 at 886-888. In that case the Reading Company and certain other companies were found to have formed an illegal combination and a decree was entered "requiring dissolution." This Court in an earlier opinion had remanded the case to the District Court and directed a decree "dissolving the whole combination * * * and such disposition of stocks and bonds and other property of the Reading Company as might be necessary." This was similar to the steps in the instant situation in that a prior Order of the Commission had directed that Power "shall be liquidated and dissolved." The Reading Company proposed a plan under which the assets of one of its subsidiaries, a coal company, were to be transferred to a new corporation and rights to subscribe to the stock of the new corporation were to be offered, share for share, alike to the preferred and common stockholders of the Reading Company. The rights offered were very valuable. Common stockholders objected on the ground that the distribution being made in the form of the rights was in effect a distribution of the surplus of the company, which, in a continuing enterprise, could have been used upon certain conditions to pay common stock dividends and hence it was unfair to divide the surplus between the preferred and the common in accordance with the liquidation provisions of the charter. This Court pointed out that although the rights were to be offered at $2.00 their then quoted market value ranged from $11 to $20, and said:

> "This might have been expected, in view of the disparity between par of the capital stock of the Reading Coal Company and the far greater actual value of its properties. The disparity shows that while the

transfer of certificates of interest in the new Coal Company stock is denominated a sale, *it is only a distribution of the surplus or assets of the Reading Company, to its stockholders, made necessary by the decree of this court* in taking the Reading Company out of the coal business and restricting it to that of owning and operating a railroad system. The Reading Company, by merger with the Reading Railway Company, is made to change its character. Under the plan it must comply with the Act of May 3, 1909, Penn. Laws, 408, by which, in merging with the Reading Railway Company, it becomes a new corporation.

* * *

"*What is to be done is, in fact and law, a liquidation of the assets of the old Reading Company.* Its stockholders receive their distribution in kind by retention of the stock they held in the old Reading Company as stock in the reduced new Reading Company, purged of its offense against the law, together with the distributive values of that which the old Reading Company has been compelled to get rid of: i. e., the ownership of the stock of the Coal Company."

* * *

"*The rights of the common and preferred stockholders of the Reading Company inter sese are to be determined by the organization agreement of 1896.*" (Italics supplied.)

This Court then pointed out that although it might be argued that the surplus could have been used to pay common dividends under certain conditions, the Board of Directors had failed to declare dividends on the common out of such surplus and therefore the surplus was part of the assets of the corporation "as of the time of the compulsory winding up and liquidation of the corporation." This Court then held that, as the charter gave the preferred and common the right to share equally in a distribution of assets upon liquidation, such charter provisions must gov-

ern as there was a liquidation. This Court in effect matured the liquidation rights of both classes of stock upon the "compulsory winding up and liquidation of the corporation."

In the instant case we have a "compulsory winding up and liquidation of the corporation" due to the passage of the Act which declared it to be the public policy of this country that an enterprise such as that engaged in by Power must end. This we submit matured the claims of all classes of stock, and requires treatment in accordance with the liquidation preferences set forth in the charter.

2. The finding of value in the common stock was based on speculation and was not a fact finding and was not a fair and equitable manner in which to determine present values.

We further wish to argue that, even if the respective values of the preferred and common stocks of Power are treated as in a continuing enterprise, still the findings of the Commission as to earnings, and the earnings tables in the record, do not afford a substantial basis for a judicial determination that the preferred stockholders should be deprived of 5.48% of the value of the assets to be distributed.

In order to support the proposition that 5.48% of the value should be taken away from the preferred stockholders the Commission says "we have assumed earnings of $6,185,000.00," and adds that "this figure must be regarded as a very liberal assumption of earning power." The Commission further says, "it is recognized that at best the interest of the common stock in earnings is remote," and that the remoteness is further "demonstrated by the fact that actual earnings have fluctuated substantially, and have never in the past ten years exceeded the figure we are assuming, except in 1942."

Admitting that the chances of the common stock are very remote, and that the assumed earnings are very liberal, the Commission, adopting that liberal assumption, came to the conclusion that it will require approximately 15 years at that rate for dividend arrearages on the preferred to be paid. The courts below accepted this assumption and the conclusion based upon it as a finding of fact. In view of the fluctuations of earnings in the past, and the tremendous uncertainties of the 15 years next to come, a determination that the common stock has a presently recognizable value as high as 5.48% of the assets rests upon a theoretical speculation, which does not adequately support a judicial determination.

Conclusion.

It is respectfully urged that the Writ of Certiorari prayed for in the foregoing Petition be granted.

Respectfully submitted,

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